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In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL SCOTT GAHAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the search of petitioner's premises exceeded the scope of the search warrant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 865 F.2d 1490.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1989. A petition for rehearing was denied on March 3, 1989 (Pet. App. 25a). The petition for a writ of certiorari was filed on April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2), petitioner was convicted on one count

of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, followed by a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-24a).

1. On September 12, 1986, Michael Vetter, an agent of the Drug Enforcement Administration, obtained a warrant to search petitioner's premises at 7609 Douglas Lake Road, Johannesburg, Michigan. In the accompanying affidavit, Agent Vetter described the premises as follows:

> 7609 Douglas Lake Road, Charleton Township, Otsego County, Johannesburg, Michigan, three story wood frame house with natural wood siding with an unattached four-car garage with natural color siding. Also located on the property is a single story wood frame log cabin-type structure painted dark brown in color. Also located on the property is a small wood frame shed-type building with a metal roof.

The affidavit also set out the probable cause to believe that narcotics and related paraphernalia would be found on the premises. It stated that a confidential informant had purchased marijuana on three occasions at the property known as 7609 Douglas Lake Road, and that the transactions often took place at a one-story wood frame cabin on the premises. Moreover, according to the informant, petitioner and his confederates kept their narcotics in different locations on the premises. Finally, the affidavit recounted a controlled purchase of narcotics from petitioner, conducted on the premises and under the surveillance of Agent Vetter on September 12, 1986. Pet. App. 4a-5a & n.1.

Acting pursuant to the warrant, federal agents searched two buildings—"House B" and "Cabin #3."[1] From Cabin #3 the agents seized a quantity of marijuana and hashish, and from House B they seized currency (including $700 in marked bills from the September 12 controlled buy), weapons, a ledger, a triple beam scale, and a quantity of narcotics. Pet. App. 6a-7a.

2. Petitioner moved to suppress the evidence. He asserted that Cabin #3 is a separate residence with its own address of 7577 Douglas Lake Road. Petitioner contended that in searching Cabin #3 the agents had exceeded the scope of the warrant, which authorized only the search of the premises at 7609 Douglas Lake Road.

At the hearing on the motion, the prosecutor elicited testimony that the driveway that serviced House B extended as well to Cabin #3, and that a separate driveway for Cabin #3 was not constructed until the investigation of petitioner and his confederates was well underway. Moreover, the evidence showed that whereas the address for House B, 7609 Douglas Lake Road, was posted at the end of the nearby driveway, the address for Cabin #3, 7577 Douglas Lake Road, was posted only at the entrance to a separate driveway that serviced a different house and that no longer serviced Cabin #3. In addition, the prosecutor established that there were no address markings on either House B or Cabin #3; that during much of the investigation there was a single mailbox for both House B and Cabin #3 located at the end of the driveway that serviced House B; and that there was no mailbox at the end of the separate driveway that was constructed to service

[1] The designations are taken from the diagram attached by the court of appeals at the conclusion of its opinion (see Pet. App. 24a).

Cabin #3. Finally, the testimony showed that House B was under construction and only partially completed at the time of the investigation. Pet. App. 7a-10a.

The trial court denied the motion to suppress, concluding that the agents had acted in good faith under this Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984). The court explained that the agents "believed * * * the Court had authorized them to include the[] two premises." It also noted that there was no indication on the premises that Cabin #3 had an address different from House B. Pet. App. 12a.

3. The court of appeals affirmed (Pet. App. 1a-24a), holding that the search of Cabin #3 was lawful. The court agreed with petitioner that the warrant did not sufficiently describe the cabin. It held, however, that the description in the accompanying affidavit was sufficient, and that the affidavit, together with certain facts about the premises known by the agents, could be relied upon to provide sufficient particularity (*id.* at 16a-21a).[2]

ARGUMENT

Petitioner contends (Pet. 8-16) that Agent Vetter's affidavit could not be used "to cure [the] lack of particularity" in the warrant to search his premises (Pet. 10). That issue, however, is not presented in this case because, in the factual context of the case, the search warrant itself was sufficiently particular to justify the search of Cabin #3.

As a general matter, search warrants must be read in a common sense fashion. See *Illinois* v. *Gates*, 462 U.S. 213,

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[2] The court of appeals also rejected (Pet. App. 21a-22a) the contention that the trial court should not have admitted into evidence the firearms and ammunition seized during the search. The petition does not present that issue.

235-236 (1983). Moreover, in determining whether the identification of the place to be searched satisfies the Fourth Amendment's command of specificity, "[i]t is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended" (*Steele v. United States*, 267 U.S. 498, 503 (1925)). As one commentator has noted, "the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate" (2 W. LaFave, *Search and Seizure* § 4.5, at 207 (2d ed. 1987)).

In the present case, there is no doubt that the agents searched exactly the premises "intended by the magistrate" (2 W. LaFave, *supra*, § 4.5, at 207)—which included Cabin #3. The affidavit expressly stated that petitioner and his confederates had kept their narcotics "in different locations upon and about the property located at 7609 Douglas Lake Road" (Pet. App. 5a n.1). Plainly, the agents and the magistrate understood that there was more than one building on the premises. Indeed, the affidavit made clear that among the "locations" on the premises was "a one-story wood frame cabin" and that some of the narcotics transactions had taken place there (*ibid.*). That "wood frame cabin" was Cabin #3.

Moreover, it was not unreasonable for the agents and the magistrate to believe that Cabin #3 was part of 7609 Douglas Lake Road, along with House B. The cabin shared a common driveway with House B; it shared a common mailbox with House B; and the cabin bore no indication that it had a different address from House B. What is more, House B was under construction and only partially completed at the time of the investigation. It was therefore reasonable for the agents and magistrate to assume that

the fully renovated cabin was part of the same premises as House B.

To be sure, Cabin #3 turned out to have a separate address from House B. But this Court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants" (*Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987)). In the *Garrison* case, for example, police officers, executing a warrant to search the "third floor apartment" in a particular building, discovered during the search that there were two separate apartments on that floor. This Court held that even if the warrant did not extend to the respondent's apartment in particular, the search was nonetheless lawful under the Fourth Amendment. The Court explained that "the validity of the search of respondent's apartment * * * depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable" (*id.* at 88). Applying that standard, the Court found that "[t]he objective facts available to the officers at the time suggested no distinction between [the two apartments]" (*ibid.*). The Court therefore concluded that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment" (*id.* at 88-89).

The same principles apply to this case. Here, as well, the agents believed—and had every reason to believe—that both Cabin #3 and House B were part of 7609 Douglas Lake Road. As in *Garrison*, "[t]he objective facts available to the officers at the time suggested no distinction between" the two buildings (480 U.S. at 88). "With the benefit of hindsight" (*Garrison*, 480 U.S. at 85), of course, it is now clear that the cabin had its own address. But "judg[ing] the constitutionality of [the agents'] conduct in

light of the information available to them at the time they acted" (*ibid.*), the search in this case was entirely reasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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